

MV 97-8

Tax Type: MOTOR VEHICLE USE TAX

Issue: Rolling Stock (Vehicle Used Interstate For Hire)
Use Tax on Purchases (Non-Filer) Extended Statute of
Limitation

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	Case No.
)	IBT No.
v.)	
)	Administrative Law Judge
TAXPAYER,)	Mary Gilhooly Japlon
Taxpayer)	

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General Richard A. Rohner, on behalf of the Department of Revenue of the State of Illinois; Collins & Collins, by Michael R. Collins, on behalf of TAXPAYER

SYNOPSIS:

This matter comes on for hearing pursuant to the timely protest by TAXPAYER (hereinafter "TAXPAYER" or "taxpayer") of Notice of Tax Liability ("NTL") No. XXXXX issued by the Department of Revenue (hereinafter "Department") on June 15, 1992 for \$121,163 in tax, \$31,866 in penalty and \$133,034 in interest, for a total of \$286,063 for Use Tax, penalty and interest due on the purchase of fixed assets, buses and parts for buses owned by the taxpayer. The period at issue is July 1, 1981 through August 31, 1990. Prior to hearing, an agreed order was entered dismissing the assessment of tax, interest and penalties on all buses purchased prior to January 1, 1989 which were included in the NTL. Also, a reaudit conducted by the Department

resulted in the elimination of tax on the purchase of bus parts for 1986, 1987 and 1988. The liability which remains at issue is \$58,631 in tax, \$15,581 in penalty and \$79,297 in interest, for a total of \$153,509.

Hearings were held on November 14, 1996 and November 21, 1996 whereat Messrs. WITNESS A and WITNESS B testified on behalf of the taxpayer, and Ms. WITNESS C testified as an adverse witness on behalf of the taxpayer. Specifically at issue is whether the taxpayer is entitled to the "rolling stock" exemption of the Use Tax Act on its purchase of fixed assets and parts to be incorporated into buses owned by the taxpayer. Subsequent to the hearing, the parties filed memoranda of law in support of their respective positions.

Following the submission of all evidence and a review of the record and briefs filed herein, it is recommended that this matter be resolved in favor of the Department of Revenue.

FINDINGS OF FACT:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Corrections of Returns, showing a total liability due and owing in the amount of \$153,029 for state Use Tax delinquencies and penalty for the period of September 1, 1981 through August 31, 1990. (Dept. Gr. Ex. 1; Tr. pp. 7-8).

2. Pursuant to a reaudit, the liability was reduced to \$58,631 in tax, \$15,581 in penalty and \$79,297 in interest for a total of \$153,509. (Dept. Gr. Ex. 1; Tr. pp. 7-8).

3. The taxpayer is an Illinois corporation with its principal place of business in Chicago Ridge, Illinois. (Joint Ex. No. 1, par. 1).

4. On July 18, 1985 the Interstate Commerce Commission issued certificate XXXXX to the taxpayer granting it the authority to operate as a common carrier of passengers by motor vehicle in interstate commerce between all points in the United States. (Joint Ex. No. 1, par. 2, Ex. 18).

5. In addition to transporting passengers to and from school, the taxpayer runs interstate charter trips for hire to private groups. It transports passengers for hire to differing states for field trips, sporting events and other extracurricular activities. (Joint Ex. No. 1, par. 5).

6. The Department issued NTL No. XXXXX to the taxpayer on June 15, 1992 for the audit period of July 1, 1981 through August 31, 1990. (Joint Ex. No. 1, par. 6, Ex. 1).

7. The taxpayer filed a timely protest to the NTL on July 14, 1992. (Joint Ex. No. 1, par. 7, Ex. 2).

8. Pursuant to an Agreed Order entered on September 27, 1994, the tax, interest and penalties assessed on all buses purchased prior to January 1, 1989 which were included in the NTL were dismissed. This resulted in the elimination of \$31,718 in tax. (Joint Ex. No. 1, par. 10, Ex. 5).

9. Pursuant to a reaudit, the assessment on bus parts for the years 1986, 1987 and 1988 was eliminated in the amount of \$30,814 based upon documentation indicating that this amount was previously

paid by the retailer, Bus Sales, Inc. (Joint Ex. No. 1, par. 11, Ex. 6).

10. From the period of 1981 to the present, the taxpayer's business has consisted of two types of transportation services. (Tr. p. 12).

11. The taxpayer conducts a school bus business, which consists of driving children to and from school. (Tr. p. 12).

12. The taxpayer also conducts a charter bus business, which consists of conducting charter bus trips for schools and for the general public, both in state and out of state. (Tr. pp. 12, 19).

13. The taxpayer provides both the bus and the driver for charter trips. (Tr. pp. 12-13).

14. TAXPAYER Coach takes people to and from other carriers located at airports, train stations and other bus stops. (Tr. p. 13).

15. The taxpayer has advertised its charter services in the Yellow Pages since 1979. (Tr. p. 19).

16. The taxpayer charges the schools for charter trips in accordance with the rates and tariffs filed with the Interstate Commerce Commission, separate and apart from its billing for school route trips. (Tr. pp. 20-21).

17. The taxpayer does not enter into contracts with the school regarding school chartered bus trips. Rather, a trip sheet or trip ticket is executed by the taxpayer. (Tr. p. 31).

18. Charter excursions across the state line that involve an overnight stay by the passengers consist of two types. The passengers can be dropped off at their out-of-state destination by a bus that then returns to its terminal in Illinois. The passengers are then

picked up and returned home at the end of their trip. (Tr. p. 27, Joint Ex. No. 1, Ex. 11).

19. If the passengers prefer, they can request that the bus and the driver stay with them upon arrival at their out-of-state destination, and then return them to Illinois one or two days later. (Tr. p. 27, Joint Ex. No. 1, Ex. 11).

20. When the taxpayer purchases each bus, it is purchased for general purpose use; it can be put to any use, including interstate use. (Tr. pp. 27-28).

21. The taxpayer engages in interstate charter trips on a year round basis. (Tr. p. 28).

22. All mechanical and hydraulic maintenance of the taxpayer's buses is performed by the taxpayer within its own shop. (Tr. p. 29).

23. The taxpayer purchases its parts from Bus Sales, a sister company and subsidiary of Cook Illinois Corporation, which is a parts warehouse. (Tr. pp. 30, 36).

24. TAXPAYER provides school bus transportation services for four school districts. (Tr. p. 32).

25. There are 99 buses in the taxpayer's fleet. (Tr. p. 32).

26. Not all of those buses are used on a daily basis; some are in "repair and reserve". (Tr. p. 32).

27. The taxpayer employs 92 drivers. (Tr. pp. 32-33).

28. The majority of the taxpayer's business consists of school route transportation. (Tr. p. 33).

29. Bus Sales sells buses and services them in its machine shop. (Tr. p. 35).

30. In tracking the purchase of parts that were used in taxpayer's buses, the taxpayer initially pulled repair orders from repair folders for a test period that corresponded to certain bus numbers. (Tr. pp. 37-38).

31. For the year 1985, as well as for the year 1990, a sampling of buses was taken. (Tr. p. 45).

32. Six out of the 99 buses in taxpayer's fleet were used as a sample in the tracing of parts purchased for the test period of February and December 1985. (Tr. p. 42).

33. A much larger sample of buses was used for the test period of July and August 1990. (Tr. p. 46).

34. February and December 1985 invoices were used as a sampling because the months of February and December 1985 comprised the test period of the original audit. (Joint Ex. No. 1, par. 18; Tr. pp. 39, 49).

35. Likewise, July and August 1990 invoices were used as a sampling because the same months comprised the test period in the Department's original audit. (Joint Ex. No. 1, par. 21).

36. Each bus has its own repair folder. Inside each repair folder are repair orders. (Tr. p. 38).

37. Repair orders were traced to invoices for parts purchased from Bus Sales. (Tr. pp. 38-39).

38. The invoices were traced to the assessment of parts for the test period. (Tr. p. 39).

39. Ninety to ninety-five percent of the parts can be traced to a repair order for a particular bus. (Tr. p. 43).

40. Bus Sales purchases many of the same types of parts from its supplier, as the bus companies to which Bus Sales sells all use the same types of parts. (Tr. p. 43).

41. Each of the bus companies has its own inventory of parts. (Tr. p. 43).

42. A bus company can have a four or five months' supply of parts in its warehouse. (Tr. p. 49).

43. TAXPAYER does not resell any of its parts; all of purchases of parts are for use on its own fleet of buses. (Tr. p. 44).

44. The taxpayer attempts to standardize its fleet of buses so that all of the parts are interchangeable. (Tr. p. 50).

45. According to the parties' Stipulation, when comparing Stipulation exhibit Nos. 12, 13 and 14 the taxpayer has shown, based upon the sample taken of the audit test months of February and December 1985, that the bus parts at issue can be traced to buses identified in Stipulation paragraphs 13 through 17. (Joint Ex. No. 1, par. 20).

46. Furthermore, the parties stipulated that when comparing Stipulation exhibit Nos. 15, 16 and 17 the taxpayer has shown, based upon the sample taken of the audit test months of July and August 1990, that the bus parts at issue can be traced to the buses identified in Stipulation paragraphs 13 through 17. (Joint Ex. No. 1, par. 23).

CONCLUSIONS OF LAW:

The Department prepared corrected returns for Use Tax liability pursuant to section 5 of the Retailers' Occupation Tax (hereinafter ROT) Act (35 ILCS 120/5). Said section is incorporated by reference

in the Use Tax Act via section 12 thereof (35 **ILCS** 105/12). Section 5 of the ROT Act provides in pertinent part as follows:

In case any person engaged in the business of selling tangible personal property at retail fails to file a return, the Department shall determine the amount of tax due from him according to its best judgment and information, which amount so fixed by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown in such determination. ... Proof of such determination by the Department may be made at any hearing before the Department or in any legal proceeding by a reproduced copy or computer print-out of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue. ... Such certified reproduced copy or certified computer print-out shall, without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax due, as shown therein. (35 **ILCS** 120/5).

In the case at bar, the taxpayer is challenging the assessment by the Department of Use Tax, penalty and interest on the purchase of parts for its fleet of buses. The taxpayer asserts that the purchases are exempt from Use Tax based upon the "rolling stock exemption" as set forth in sections 3-55 and 3-60 of the Use Tax Act as follows:

Sec. 3-55. Multistate exemption. To prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this state under the following circumstances:

(b) The use, in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce... . (35 **ILCS** 105/3-55).

Sec. 3-60. Rolling stock exemption. The rolling stock exemption applies to rolling stock used by an interstate carrier for hire, even just between points in Illinois, if the rolling stock transports, for hire, persons whose journeys or property whose shipments originate or terminate outside Illinois. (35 **ILCS** 105/3-60).

To be considered an interstate carrier for hire, the taxpayer must either possess an Interstate Commerce Commission Certificate of Authority, an Illinois Commerce Commission Certificate of Authority, or be a carrier recognized by the Illinois Commerce Commission. (See, 86 Ill. Admin. Code ch. I, Sec. 130.340). In the instant case, the parties stipulated that the Interstate Commerce Commission issued a certificate to the taxpayer granting it the authority to operate as a common carrier of passengers by motor vehicle in interstate commerce between all points in the United States. (Joint Ex. No. 1, par. 2; Ex. 18).

Regarding the requirement that an interstate carrier must be "for hire", the administrative rules provide that "[t]he term 'rolling stock' includes the transportation vehicles of any kind of interstate transportation company for hire (... bus line, ...)", but the exemption does not contemplate vehicles:

used by a person to transport its officers, employees, customers or others not for hire (even if they cross State lines) or to transport property which such person owns or is selling and delivering to customers (even if such transportation crosses State lines). 86 Ill. Admin. Code ch. I, Sec. 130.340(b).

In sum, the taxpayer must prove by documentary evidence that it is an interstate carrier for hire using rolling stock that transports

persons or property moving in interstate commerce. It is noteworthy that the taxpayer relies upon its certificate of authority as evidence that it is an interstate carrier for hire. In First National Leasing & Financial Corporation v. Zagel, 80 Ill.App.3d 358, 360 (4th Dist. 1980), the Court specifically holds that "... the certificate of temporary authority, by itself, is insufficient evidence of interstate activity." Granted, in the case at bar, there was testimony regarding the taxpayer's adherence to the rules and regulations of the Interstate Commerce Commission. However, as the testimony in First National Leasing & Financial Corporation, *id.*, was not sufficient to prove interstate activity, testimony by the taxpayer's witness, likewise, is not adequate to establish that the taxpayer is an interstate carrier for hire. Rather, documentary evidence in the form of books and records is necessary. As the taxpayer has tendered trip tickets as part of the stipulation exhibits, I will consider those sufficient substantiation of taxpayer's claim that it is an interstate carrier for hire as the information provided thereon supports this assertion. In addition, the parties stipulated in paragraph 5 of Joint Ex. No. 1 that the taxpayer runs interstate charter trips for hire for private groups. This, also, supports the taxpayer's claim that it is an interstate carrier for hire.

The taxpayer must next prove that the vehicles at issue are used as rolling stock moving in interstate commerce. That is, the taxpayer must show with competent evidence that its rolling stock (i.e., vehicles) transports, for hire, "persons whose journeys or property whose shipments originate or terminate outside Illinois" and

therefore, qualifies for the rolling stock exemption.¹ Furthermore, as repair parts, not buses, are at issue herein, the taxpayer must prove that the parts it purchased were incorporated into rolling stock that moved in interstate commerce.

Several questions arise, such as (1) what types of trips constitute interstate commerce and qualify for the rolling stock exemption; and (2) how much interstate movement is necessary for an otherwise qualifying taxpayer to be entitled to the exemption. The regulations pertaining to the statutes at issue do not directly address these questions, but do shed some light on the issues. 86 Ill. Admin. Code ch. I, Sec. 130.340 provides in relevant part as follows:

(c) The rolling stock exemption cannot be claimed by a purely intrastate carrier for hire as to any tangible personal property which it purchases because it does not meet the statutory tests of being an interstate carrier for hire.

(d) The exemption applies to vehicles used by an interstate carrier for hire, even just between points in Illinois, in transporting, for hire, persons whose journeys or property whose shipments, originate or terminate outside Illinois on other carriers. The exemption cannot be claimed for an interstate carrier's use of vehicles solely between points in Illinois where the journeys of the passengers or the shipments of property neither originate nor terminate outside Illinois.

¹. Chapter I, Section 130.340(a) of 86 Ill. Admin. Code provides that "... the Retailers' Occupation Tax does not apply to sales of tangible personal property to interstate carriers for hire for use as rolling stock moving in interstate commerce... ." Subsection (d) provides in essence that in order for the rolling stock to be moving in interstate commerce, it must transport, for hire, "... persons whose journeys or property whose shipments, originate or terminate outside Illinois on other carriers. ..." Therefore, the rolling stock exemption itself is explicative of the phrase "interstate commerce".

The stipulation of record (Joint Ex. No. 1) provides in paragraphs 20 and 23 that the bus parts purchased in the test months of February and December 1985, and July and August 1990, can be traced into buses identified in Stipulation paragraphs 13 through 17. Those paragraphs provide that stipulation exhibit numbers 7, 8, 9, 10 and 11 list trips across state lines or trips with passengers in route across state lines for the audit years. Also provided in said stipulation exhibits are trip tickets for trips across state lines or trips with passengers in route across state lines for taxpayer's buses for the years 1981 through 1985, and 1989 through 1990. Trip tickets for overnight trips across state lines for taxpayer's buses for the years 1981 through 1985, and 1989 through 1990, are also part of a stipulation exhibit.

It is to be recalled that the taxpayer has 99 buses in its fleet, but only six out of the 99 buses were used as a sample for the audit test months of February and December 1985. A much larger sample of buses was used for the audit test months of July and August 1990. The taxpayer used the test months of February and December 1985, and July and August 1990 when tracing part purchases. Thus, not only were test periods used in regard to the taxpayer's purchase of parts, but the part purchases were traced to only six buses in taxpayer's fleet for the earlier audit period, and to a much larger number of buses (but unclear as to how many), for the later audit period.

Even accepting that two test check months in each of two audit years are representative of purchases throughout the audit period, there are concerns plaguing the taxpayer's case. There is a

distinction between a vehicle traveling interstate, or across the state line, and "rolling stock moving in interstate commerce". The exemption is accorded to stock, the journeys of which originate or terminate outside Illinois. A state can tax the instrumentalities of interstate commerce, as long as two conditions are met: (1) an obvious nexus exists between the taxing state and the object(s) taxed; and (2) the tax is fairly apportioned, so that there is no unreasonable taxation. (First National Leasing & Financial Corp. v. Zagel, supra).

The taxpayer itself has distinguished the types of trips it makes. TAXPAYER takes trips across state lines, or trips with passengers in route across state lines. This is evidenced by trip tickets for the years 1981 through 1990 (Joint Ex. No. 1, pars. 13-17, Ex. Nos. 7, 8, 9 and 10). Furthermore, the taxpayer provides trip tickets for "overnight trips across state lines...". (Joint Ex. No. 1, par. 17, Ex. No. 11). Certainly, buses taking passengers to airports, train depots and bus terminals to drop off or pick up passengers would qualify for the rolling stock exemption because it can be reasonably be assumed that those passengers journeys either began or will terminate outside Illinois on other carriers. That is precisely the scenario contemplated as qualifying for the exemption. It may even be the case that overnight trips qualify for the exemption as the trip from Illinois to the other state ends when the passengers disembark from the bus, and a new journey begins in another state when the passengers embark a bus to return to Illinois. On the other hand, trips taken by the vehicles to neighboring states that begin and end the same day do not qualify for the exemption as they can be construed

as one continuous journey which both begins and ends in Illinois. An interstate trip taken by a vehicle is not the equivalent of rolling stock moving in interstate commerce.

I have stated that the taxpayer has distinguished the types of trips it makes. However, the taxpayer needs to go one step further. It must provide documentary evidence to support the types and number of trips. Nowhere in the record is there evidence of any trips carrying passengers in route across state lines. As there is no evidentiary differentiation of this type of exempt trip from same day trips across state lines, none of the buses can be accorded the exemption.

Regarding the "overnight trips", exhibit 11 to the stipulation consists of trip tickets evidencing overnight trips taken by 18 of the 99 buses in taxpayer's fleet. An overnight trip is distinguished from a same day trip in that the bus takes passengers across the state line, but the passengers do not return to Illinois until one or more days later. In order for the rolling stock to be exempt, the taxpayer must make the determination at the time of purchase that the bus will be utilized in interstate commerce. The taxpayer claims that when each bus at issue herein was purchased, it was purchased for general purpose use; i.e., it was intended that the vehicle could be put to any use, including use in interstate commerce. Although there is no evidence regarding the total number of trips (in state and out of state) that the buses at issue took, it stands to reason that a bus (no. 213) that makes four interstate trips during the entire audit period has not been put to interstate use very often. That same bus only made one overnight trip during the audit period. That overnight

trip, which consisted of a journey that both ended and began outside of Illinois, is certainly the type of trip contemplated to fall within the exemption. However, one overnight trip is not sufficient to determine that the rolling stock that made the trip "moved in interstate commerce" during the period at issue, by any standard.

Some of the vehicles took more interstate trips during the audit period, such as bus no. 102. Although it took 145 interstate trips, only one was overnight. Bus no. 206 took 37 interstate trips, 14 of which were overnight. The significant number of overnight trips out of the 37 total interstate trips at first sounds promising, but lacking is information regarding the total number of trips, both in state and out of state, taken by the bus. Without this information, the total picture of the activity of each bus is unavailable. It is not possible, therefore, to conclude that any of the buses that took overnight trips are exempt. Obviously, the parts incorporated into these buses cannot be considered exempt, either.

The intent behind the rolling stock exemption is the avoidance of multistate taxation. The case of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) allows a state to impose a tax on interstate commerce under certain qualifying conditions. In enacting section 3-55 of the Use Tax Act (35 ILCS 105/3-55), the Illinois legislature was reiterating that in order to prevent actual or likely multistate taxation, certain situations are exempted from the application of tax.

There is no suggestion that any other state was in a position to impose its own Use Tax on the rolling stock, nor is there any likelihood of multistate taxation due to the very limited utilization

of the buses in other states. As most of the trip tickets in evidence (Stipulation ex. no. 9) indicate interstate trips that began and ended the same day, it is highly improbable that another state could constitutionally impose a tax on the buses. Although there is evidence of some overnight trips (Stipulation exhibit no. 11), the taxpayer presented no evidence that multistate taxation was actual or probable. (See, Complete Auto Transit, Inc. v. Brady, *id.*).

In the case of First National Leasing & Financial Corporation v. Zagel, *supra*, the court opined that oral testimony concerning the taxpayer's interstate activities was insufficient to prove its claim of entitlement to the rolling stock exemption. The court denied the taxpayer the rolling stock exemption due to the fact that it lacked documentary evidence to indicate the amount of eligibly exempt interstate commerce in which it engaged. In a concurring opinion, Justice Green pronounced that the oral evidence elicited at the administrative hearing indicated that the equipment at issue crossed on an "infrequent and irregular basis". There was no bonafide risk of multistate taxation, and therefore, no commerce clause requisite for the apportionment of Use Tax to use in Illinois.

An additional problem facing the taxpayer's cause is that there is no delineation of when each bus made its interstate trip(s) in relation to when the parts were purchased. The holding in Chicago and Illinois Midland Railway Company v. Department of Revenue, 66 Ill.App.3d 397 (1st Dist. 1978) is pertinent to this matter. The Court held in that case that in order for the rolling stock exemption to apply, the interstate use of the rolling stock must have occurred during the audit period. As the exemption is claimed by the taxpayer

at the time of purchase, the record must indicate that all of the buses are used as rolling stock. There must also be an indication how the determination is made by the taxpayer to claim the exemption on its bus purchases. The taxpayer's witness testified that parts were warehoused by the bus companies, such as the taxpayer, for a four to five month period. It is of serious concern if the taxpayer claims the exemption at the time of purchase, but only uses the part, by happenstance, on vehicles that do not move as rolling stock until six months, eight months or one year later.

The taxpayer cites the case of Burlington Northern, Inc. v. Department of Revenue, 32 Ill.App.3d 166 (1st Dist. 1975), in support of its position that the rolling stock exemption is to be liberally construed in order to avoid placing any possible burden on interstate commerce. In Burlington Northern, the court was concerned with whether the imposition of state Use Tax upon the purchase of various transportation vehicles would unduly burden interstate commerce. The court could not find any legislative history or intent regarding the enactment of the rolling stock exemption, and therefore utilized general principles of statutory construction in rejecting the "original intent and primary purpose" standard employed by the Department in determining whether the rolling stock exemption was applicable to the vehicles at issue. The court found that the application of this standard may make it administratively easier for the Department to decide whether the exemption applies, but it has no basis in statute or regulation, nor was it apparently within the contemplation of the legislature. The court therefore found that Burlington Northern's physical movement across state lines 13 percent

of the time, combined with the interstate movement accorded to said taxpayer as a carrier of interstate traffic, was sufficient to allow various transportation vehicles to qualify for the "rolling stock" exemption.²

The Burlington court seems to ignore the preamble to the exemptions set forth in section 3-55 of the Act, which provides that "[t]o prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this state under the following circumstances" This appears to stem from the court's determination that the Illinois legislature intended to exempt rolling stock moving in interstate commerce regardless of the potentiality of multiple taxation. Because the intent of the legislature is so clearly provided in the statute, I respectfully disagree with the Burlington Court's determination that the preamble is meaningless and, therefore, merely superfluous. (See, also, Judge John A. Ward's findings in his Order of September 4, 1997 in National School Bus Service, Inc. v. Illinois Department of Revenue, 96 CH 13424.)

². The taxpayer also cites the case of Time, Inc. v. Department of Revenue, 11 Ill.App.3d 282 (1st Dist. 1973), in validation of its position. In Time, Inc., the court concurred with the position of Time that a taxpayer need not prove that multistate taxation will occur if it is not granted an exemption set forth in 3-55 of the Use Tax Act (formerly section 439.3). Rather, the court determined that the sole requisite is for the taxpayer to prove that it satisfies the criterion as set forth in the statute, and therefor, qualifies for the exemption.

I find Time, Inc. to recite nothing more than what is already settled case law in Illinois. It is a basic tenet that the taxpayer carries the burden of proof when claiming an entitlement to exemption. (MacMurray College v. Wright, 38 Ill.2d 272 (1967)). Time, Inc. simply clarifies that the prefatory phrase, "[t]o prevent actual or likely multistate taxation ..." is a comment on the intent behind granting the exemption.

The Burlington case is factually distinguishable from the instant case. The court in Burlington determined that the purchases of various types of equipment by the railroad company were excepted from Use Tax pursuant to the rolling stock exemption due to the intertwining of taxpayer's intrastate and interstate business. In finding passenger cars exempt, the court held that when considering Burlington's 13 percent of actual physical movement across state lines, combined with the interstate movement "conferred on" the railroad by reason of its transportation of interstate traffic consisting of mail and express packages, it can be concluded that Burlington's "interstate use and involvement is ... intertwined with its intrastate use... ." (32 Ill.App.3d 166, 176). The same reasoning was applied when finding switching engines to be exempt. That is, the railroad company's interstate use and involvement of the equipment was so intertwined with its intrastate use that to discontinue its intrastate business would in great measure negatively affect its interstate business.

In the case at bar, the evidence presented is insufficient to determine the number of trips taken by buses or with passengers in route across state lines, or to conclude that the trips taken by each bus were at all conducted on a fixed schedule or with any degree of regularity. It is impossible, therefore, to accord the repair parts the rolling stock exemption when the buses into which they were placed are not eligible for the same.

As noted previously, when granting exemptions from tax, the burden is on the taxpayer to prove clearly and conclusively its entitlement thereto. Statutes which exempt property or entities from

taxation must be strictly construed in favor of taxation and against exemption. (Wyndemere Retirement Community v. Department of Revenue, 274 Ill.App.3d 455 (2nd Dist. 1955)). In the case at bar, TAXPAYER has failed to carry its burden of proof. It is therefore, my determination that the taxpayer is not entitled to the rolling stock exemption, and that Use Tax was properly assessed on the purchases of parts. As no evidence was proffered regarding the assessment of fixed assets, Use Tax was likewise properly assessed thereon.

RECOMMENDATION:

It is my recommendation that NTL No. XXXXX be affirmed as to the purchase of bus parts (with the exception of 1986, 1987 and 1988) and fixed assets.

Enter:

Administrative Law Judge